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**Citation for published version:**

McEwen, N 2020, 'Negotiating Brexit: Power dynamics in British intergovernmental relations', *Regional Studies*. <https://doi.org/10.1080/00343404.2020.1735000>

**Digital Object Identifier (DOI):**

[10.1080/00343404.2020.1735000](https://doi.org/10.1080/00343404.2020.1735000)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Regional Studies

**Publisher Rights Statement:**

This is an Accepted Manuscript of an article published by Taylor & Francis in Regional Studies on 3 April 2020, available online: <https://doi.org/10.1080/00343404.2020.1735000>.

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# **Negotiating Brexit: Power Dynamics in British Intergovernmental Relations**

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Keywords: Brexit, devolution, Wales, Scotland, power

## **Abstract:**

This article examines the power and influence of the Scottish and Welsh governments in shaping UK Brexit policy during the first phase of Brexit, from the EU referendum to the Withdrawal Agreement. It analyses their limited recourse to constitutional authority, and their exploitation of procedural and soft power, in their efforts to make UK Brexit policy reflect devolved government interests. It draws a distinction between the external and internal dimensions of Brexit, noting the inability of the devolved governments to gain any influence in shaping the former despite increased procedural opportunities. By contrast, both constitutional and, especially, non-constitutional power shaped intergovernmental dynamics with respect to the domestic Brexit process, helping the devolved governments to secure concessions regarding the impact of UK Brexit legislation on devolution.

# **Negotiating Brexit: Power Dynamics in British Intergovernmental Relations**

## **Introduction**

The first phase of Brexit involved protracted attempts by the UK government to negotiate EU withdrawal, set the priorities for the UK's future relationship with the EU, and prepare the UK for life after Brexit. The UK government was not the only administration in the UK to have a stake in Brexit outcomes, however. This article turns its attention to the power of the devolved governments in the Brexit process, asking to what extent they could shape the UK's approach to negotiations towards, and preparations for, Brexit. The empirical timeframe in the paper is centred upon Mrs May's three-year term of office, from July 2016 to July 2019, but the dynamics of power it exposes have continued to shape relationships between the UK and devolved governments under her successor. As Northern Ireland was without a governing executive for much this period, this article focuses on an analysis of the power and influence of the Scottish and Welsh governments in intergovernmental relations.<sup>1</sup>

Brexit poses considerable challenges for devolution. Almost every area of devolved competence is touched to a greater or lesser degree by EU law, and the fate of the 'repatriated' powers hitherto under the regulatory ambit of the EU has been a key concern. The interests of the devolved governments are also driven by divergent Brexit preferences. In Scotland and Wales, the devolved governments were strongly pro-Remain in the 2016 referendum and, although the Leave vote secured a majority in Wales almost on a par with the English Leave vote (52.5% and 53.4% in Wales and

England respectively), a clear majority (62%) in Scotland supported Remain. In Northern Ireland, the 55.8% majority for Remain masked deep internal divisions between catholic/nationalist and protestant/unionist communities. The devolved governments were thus anxious from the outset to shape the Brexit process.

In examining the extent to which devolved governments have influenced the Brexit policy process to date, the article is centred upon power dynamics in Brexit-focused intergovernmental relations. Intergovernmental relations refer to the discussions, negotiations and 'working connections' between governments elected at different institutional arenas within the same state (Agranoff, 2004). They may be horizontal, between sub-state governments of a similar constitutional status, or vertical, between one or more of these governments with the central or federal government. They may be more, or less, institutionalized, conducted formally within interministerial fora or in the day-to-day interactions of political actors and policy officials (Bolleyer, 2009; Behnke and Mueller, 2017). Whatever their form or purpose, intergovernmental relations are relations of power. The dynamics of the relationship are shaped by the respective interests and power of the actors involved.

The article focuses upon the extent to which the UK government's Brexit policy positions changed as a result of intergovernmental pressure such that they became more closely aligned with the interests and preferences of the devolved governments. We examine the relative significance of three distinctive bases of power that may be accessed by the devolved governments: constitutional power; procedural power; and 'soft power' diplomacy. The article draws upon a rich collection of documentary sources, including government statements, ministerial letters, ministerial testimonies

at parliamentary committee inquiries, parliamentary debates and political speeches. This is supplemented by insights derived from informal meetings with officials across the UK, Scottish and Welsh governments, to gain a better understanding of the motivations underpinning statements made in documentary evidence.<sup>2</sup>

The first section of the article explores the bases of power in intergovernmental relations. This is followed by an unpacking of the 'Brexit process', in which a distinction is drawn between the external and internal dimensions of Brexit. The external dimension incorporates the development of UK negotiating priorities and the period of negotiations with the EU that led to the Withdrawal Agreement and the Political Declaration. The internal dimension focuses upon the domestic preparation for Brexit, notably the legislation giving effect to the process of withdrawal. The remainder of the article then examines power dynamics in, first, the external, then the internal, Brexit process to ascertain the power and influence of the devolved governments in shaping the direction of UK Brexit policy. Our working hypothesis is that the relative weakness in the constitutional authority of the UK's devolved governments, coupled with the limited opportunities resulting from the *ad hoc* nature of intergovernmental procedures, constrains the opportunities for devolved governments to influence the Brexit process. We examine the extent to which the devolved governments, individually or collectively, used 'soft power' to shape Brexit outcomes despite their lack of 'harder' sources of power.

## **Power dynamics in intergovernmental relations**

Addressing the power and influence of devolved governments in shaping the Brexit process first requires consideration of what we mean by 'power'. In its most succinct expression, courtesy of Dahl, power may be expressed as devolved governments having power over the UK government to the extent that they could get the latter to do something it would otherwise not do (Dahl, 1957: 202-3). Identifying when government positions change is easier than identifying whether that change was a result of devolved government intervention. As Nye put it, 'When we measure power in terms of the changed behavior of others, we have first to know their preferences. Otherwise we may be as mistaken about our power as a rooster who thinks his crowing makes the sun rise' (Nye, 2004: 2). Power should therefore be examined both in terms of outcomes and relationship dynamics. For Barnett and Duvall, power is 'the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate' (2005: 42). This puts the emphasis on the devolved governments' capacities and interventions aimed at securing Brexit outcomes that reflect their preferences, and constrain the capacities of the UK government to pursue objectives deemed contrary to devolved interests.

For Dahl, understanding power relations necessitates an examination of the bases of power and the means by which these are exercised (Dahl, 1957: 203-5). Three distinct bases of power are used to structure the analysis in this article: constitutional; procedural; and soft power.

Constitutional power concerns the relative constitutional authority of the devolved institutions vis-à-vis Westminster and Whitehall. This includes their constitutionally-derived authority to act autonomously. It also includes their authority to co-determine

the decisions of the UK government and parliament through consent or veto powers. The constitutional power relationship between central and sub-state governments is often asymmetric, especially in the absence of a federal constitution. In federations, the political authority of each constituent unit is protected by the constitution and each shares an equality of status within their areas of jurisdiction. Federal governments seeking to secure policy outcomes that fall in whole or in part in areas of sub-state jurisdiction are often obliged to negotiate and coordinate decision making with their sub-state counterparts (Scharpf, 1988; Tsebelis 2002). By contrast, in non-federal systems, like the UK, sovereignty remains concentrated such that the state-wide parliament can, as a matter of law, unilaterally withdraw competences from sub-state institutions, or access hierarchical authority to impose policy outcomes. Sub-state government interventions thus take place under the 'shadow of hierarchy', where outcomes can be imposed if necessary (Börzel, 2010).

Procedural power concerns the institutional processes underpinning intergovernmental interactions. Strongly institutionalized systems characterized, for example, by regular, routinized meetings, institutional autonomy, a dedicated secretariat, statutory underpinning, and clear rules and functions (Bolleyer, 2009: 25-6), can empower sub-state governments. They provide a regular platform for them to articulate their interests, underline their concerns and potentially shape policy. By contrast, in weakly institutionalized systems, where relations are less formal and meetings more ad hoc, formal inter-ministerial meetings to discuss issues of mutual concern can be at the whim of central government, making it easier for them to ignore contentious issues, or prevent them from rising up the agenda. Sub-state governments in systems where IGR are more sporadic may thus be more easily outflanked by

central government policies that impinge upon their competences and run counter to their perceived interests. In the UK, intergovernmental relations are generally weakly institutionalized, with no statutory underpinning, no formal rules, no independent secretariat and an ad hoc approach to meetings. However, the Brexit process coincided with an intensification of inter-governmental meetings to a degree hitherto unprecedented. This included an expansion of the Joint Ministerial Committee (JMC), the principal forum of inter-ministerial cooperation, and the creation of new ministerial forums. The prevalent view was nevertheless that the system remained weak and ill-equipped to cope with the pressures that the Brexit process generated (McEwen, et al, 2018).

Soft power concerns the ability of an actor to shape the preferences of others, by persuading and attracting them to their positions and interests (Nye, 2004: 6). The bases of soft power are found in the strategic use of values, political strength, interpersonal relationships and persuasive argument. It is often associated with small states in the international arena, who, much like sub-state governments in multi-level states, represent 'the weak part in an asymmetric relationship' (Steinmetz and Wivel, 2010: 6). Panke (2010) observed a range of 'counterbalancing strategies' used by small states to overcome their relative lack of 'hard power'. These include: developing strategic alliances with other states to overcome their relatively weak bargaining power when acting alone; being selective in pursuit of interests; and developing niche expertise to enhance their reputation, often supported by engagement with policy communities to draw upon a wider knowledge pool (Thorhallsson, 2017). Building 'network capital' (Golub, 2012) by nurturing relations with interlocutors also helps small states hone their arguments, with timely interventions pitched to adapt to and



counteract others' concerns. Some small states use their smallness to their strategic advantage, nurturing a reputation for being a less threatening 'honest broker' or impartial mediator. In so doing, they may broker or offer compromises that also happen to match their preferences – what Panke referred to as 'influence masked in neutrality' (Panke, 2010: 803).

Sub-state governments do not enjoy the status or opportunities for influence of small states. Nonetheless, they share many of their structural disadvantages. Soft power tools may help to compensate for these, especially in cases like the UK where the constitutional and procedural authority of the devolved governments is relatively weak. They may, for example, use horizontal intergovernmental relations with other sub-state governments, as well as drawing in the wider policy community, to develop strategic alliances and strengthen their bargaining power vis-à-vis central government (Hegele and Behnke, 2017). They may nurture inter-personal relationships with their counterparts, build network capital, seek compromises, or develop strategic priorities and niche expertise. They may draw upon political strength, where they have it, to achieve desired results. This can include legislative-executive relations within and across institutions. For example, sub-state governments can use party channels in the state-wide parliament to try to influence its legislative process. Generating broad cross-party support for their negotiating positions within their own legislatures may also add leverage in the intergovernmental arena.

Figure 1 sets out the framework examined in this article. It depicts the three bases of power that devolved governments might exercise to influence UK Brexit policy. Influence is captured by the extent to which Brexit policy outcomes match the stated

preferences of the Scottish and Welsh governments, with evidence of policy having shifted to accommodate these preferences. A high level of influence indicates that the policy positions adopted by the UK government have been frequently shaped by, or changed to accommodate, the stated preferences of devolved governments. A medium level of influence would indicate that intergovernmental dynamics have sometimes generated outcomes that accommodate these preferences and concerns. A low level of influence suggests that the decisions taken by the UK government have rarely or never shifted to reflect the concerns and interests articulated by devolved governments.

FIGURE ONE ABOUT HERE

Of course, any analysis of power must also take cognizance of the structures within which it is exercised. The machinery of government in the UK fosters a 'mobilization of bias' (Schattschneider, 1960) in favour of the central institutions of state, especially in policy spheres where they have primary or exclusive competence. This was evident in the conduct of Brexit negotiations in light of the exclusive competence of the UK authorities over international relations, including relations with the EU. However, as is evident below, the devolved governments could partially offset their structural inequality when Brexit impinged directly on matters of devolved competence.

### **External and Internal Dimensions of Brexit**

Now that we have set out how power is conceptualised, it is important to unpack what we mean by 'the Brexit process'. The article draws a conceptual and empirical distinction between the external and internal Brexit process. The two are clearly linked;

the positions adopted by the UK government in its negotiations with the EU are shaped by the domestic policy and political environment, and vice versa. Nonetheless, the external/internal distinction remains useful when analyzing power dynamics between the UK and devolved governments.

The *external* dimension concerns the UK government's preparation for and negotiations with the European Union, on behalf of the United Kingdom as a whole. The devolved governments also sought their own external relations with EU institutions, but such engagements have the status of paradiplomacy and are outside of the formal negotiation process (Hunt and Minto, 2017). In her leadership election, Theresa May infamously announced that 'Brexit means Brexit' but it was another six months before we had a glimpse of what she intended this to mean. The Prime Minister's Lancaster House speech set out 12 principles that would guide her government's negotiating priorities. These included maintaining the Common Travel Area with Ireland, control of immigration, a free trade agreement with the EU, new international trade agreements, and ending the jurisdiction of the European Court of Justice (May, 2017). These priorities set the UK on a road to leaving the EU internal market and the EU Customs Union. However, they were also difficult to reconcile with the shared commitment of the UK government and the EU 27 to maintain an open border on the island of Ireland without reinforcing the border between Northern Ireland and the rest of the UK.

The ensuing Brexit negotiations centred on agreeing the terms of exit. Here, the EU's three priorities – settling the budget; citizens' rights; and maintaining an open border in Ireland – dominated negotiations, with only preliminary consideration of the future

relationship. Following numerous proposals and lengthy negotiations (Walker, 2019), the UK and the EU27 concluded the draft Withdrawal Agreement and Political Declaration in November 2018. The protocol on Ireland/Northern Ireland annexed to the Agreement included commitments in areas of devolved competence. Many of the policy areas covered by the Political Declaration also covered areas devolved to Scotland, Wales and Northern Ireland.

That draft Agreement sought to reconcile the border challenges in Ireland by effectively committing to keep the whole of the UK and the EU in a common customs territory until a future agreement could be reached that eliminated the need for customs controls. Failure to secure Westminster parliamentary consent for this Agreement was Theresa May's downfall. The revised Withdrawal Agreement reached by her successor, Boris Johnson, releases Britain, if not the UK, from the EU customs regime by implicitly accepting a border in the Irish sea. His parliamentary majority after the 2019 General Election severely diminished the influence of opposition parties and Remain-leaning Conservative MPs to alter or block the deal. It also eliminated the Conservatives' dependence on the votes of the Democratic Unionist Party. In contrast to their considerable influence over Theresa May's government when they held the balance of power, the DUP's opposition to the revised agreement mattered little when faced with a Conservative government with a strong majority.

In parallel with negotiating withdrawal, Theresa May's government initiated an *internal* domestic legislative programme to prepare for EU exit. The centrepiece of this preparation was the EU (Withdrawal) Act. As well as repealing the European Communities Act 1972 on 'Exit day', the Act was designed to avoid a 'cliff edge' exit

from the EU. It prepared for the conversion of existing EU law into domestic law, creating a new category of 'retained EU law'. It empowered the executive to use secondary legislation to make a raft of modifications to retained EU law to ensure it remained applicable within the domestic context. The extent of executive power was one of the most controversial aspects of the legislation, but it was the devolution clauses that created most anxiety among the devolved governments.

Each of the devolution statutes required devolved laws to be compatible with EU law. That obligation resulted from the UK's EU membership, thus in the absence of any other intervention, it would have lapsed after EU exit, leaving these legislatures free to pass laws in devolved areas like agriculture, the environment and fishing that were hitherto subject to EU law. Clause 11 of the EU (Withdrawal) bill, as introduced, sought to substitute 'EU constraints' on devolved legislation with a new constraint that prohibited the devolved institutions from using primary or subordinate legislation to modify any retained EU law, including in policy areas otherwise devolved (UK parliament, 2017). The rationale underpinning this constraint can be detected in the Lancaster House speech, and the Prime Minister's oft-repeated desire to ensure Brexit strengthened rather than weakened the Union, with 'no new barriers to living and doing business within our own Union' (May, 2017).

Although these provisions remained unchanged throughout the legislation's passage in the House of Commons, the government brought forward amendments in the House of Lords that loosened the constraint considerably. In place of a blanket constraint on the devolved institutions' ability to modify retained EU law, the amendments ensured that repatriated powers would lie where they fall according to the allocation of

competences in the devolution statutes. A new section of the Act (Section 12) gave the UK government the power to make regulations to introduce restrictions to the competence of the devolved authorities to modify retained EU law. These provisions come with a legal requirement to seek (though not necessarily to secure) the consent of the devolved institutions, and to report regularly to parliament on its use of these powers. Under the 2018 Act, the power to make section 12 regulations lapses two years after exit day, and any regulations that remain in place after a further five years can be superseded by devolved legislation. By the end of the parliamentary session in November 2019, no Section 12 regulations had been introduced by either Mrs May's or Mr Johnson's administrations (Cabinet Office, 2019).

### **Evaluating the influence of the Devolved governments in the External Dimension of Brexit**

In the immediate aftermath of the 2016 referendum vote, Nicola Sturgeon, Scotland's First Minister, declared that she had 'made it clear to the prime minister this morning that the Scottish government must be fully and directly involved in any and all decisions about the next steps that the UK government intends to take' (Sturgeon, 2016a). She challenged the UK government to prove the worth of the Union by finding ways 'to demonstrate that Scotland's voice can be heard, our wishes accommodated, and our interests protected within the UK' (Sturgeon, 2016b). Carwyn Jones, then Wales' First Minister, similarly insisted that 'the Welsh government must play a full part in discussions about the timing and terms of UK withdrawal from the EU. Our participation is essential, not just for directly devolved issues, but for the whole range

of issues affecting vital Welsh interests' (Jones, 2016). But how much influence did the Scottish and Welsh governments have over the external dimension of Brexit? We first consider their declared interests and preferences then examine the extent to which they could exploit constitutional, procedural and soft power bases to ensure these interests were reflected in UK Brexit policy.

Both the Scottish and Welsh governments prioritized a soft Brexit, having campaigned strongly for Remain in the referendum. In *Scotland's Place in Europe*, the first of a series of Brexit policy documents, the Scottish government reiterated the importance of the UK as a whole remaining within the European single market and the EU customs union or, failing that, a differentiated arrangement that could maintain Scotland's place within the European single market (Scottish government, 2016). In *Securing Wales' Future*, the Welsh government, in collaboration with Plaid Cymru, urged the UK government to prioritize 'full and unfettered access to the Single Market for goods, services and capital', but stopped short of embracing freedom of movement and was more ambivalent on membership of the EU Customs Union (Welsh government/Plaid Cymru, 2017).

Despite actively developing distinctive policy positions for the external dimension of Brexit, the devolved institutions had little constitutional power to influence UK policy. Across each of the devolution settlements, constitutional authority over external relations, including relations with the EU, lies exclusively with the UK parliament and government. There is no formal right to co-determine the approach to external relations, nor any formal rights to be consulted. However, the Memorandum of Understanding and accompanying Concordats have long recognized the devolved

governments' legitimate interest in EU issues, with commitments to involve them 'as directly and fully as possible in decision making on EU matters' that directly or indirectly touch on devolved matters or the devolved territories (UK government, 2013: 22-7).

That understanding generated opportunities for the devolved governments to access procedural power to advance their interests. Indeed, Brexit has spawned a significant intensification of formal intergovernmental relations. In the three years prior to the 2016 referendum, there had been one meeting of the JMC Plenary (JMC P) and one meeting of the JMC Domestic; only the JMC Europe continued to meet at regular intervals, ahead of European Council meetings (JMC Joint Secretariat, 2015). Between the referendum in June 2016 and June 2019, four meetings of JMC Plenary had been held and seventeen meetings of a new forum – the JMC EU Negotiations (JMC EN) (JMC Joint Secretariat, 2018). The JMC EN continued to meet after Boris Johnson became Prime Minister, with two meetings in the months prior to the prorogation of parliament. In 2018, the JMC EN initiated the Ministerial Forum on EU negotiations, to bring together more junior portfolio ministers for regular policy-focused discussions intended to feed into Brexit negotiations. Eight of these had been held between May 2018 and February 2019.<sup>3</sup>

Moreover, the terms of reference of the JMC EN suggested more opportunities for exercising power through this procedural route than any intergovernmental forum that had preceded it. The new forum committed the governments to 'work collaboratively to:



- discuss each government's requirements of the future relationship with the EU;
- seek to agree a UK approach to, and objectives for, Article 50 negotiations;
- provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations;
- discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK government, the Scottish government, the Welsh government or the Northern Ireland Executive' (JMC, 2016).

The commitment to 'seek to agree' a common approach had already been advanced by the Prime Minister, including when she made a visit to Nicola Sturgeon, Scotland's First Minister, the first official visit of her premiership (BBC, 2016). It suggested an opportunity to co-determine the UK's approach to Brexit negotiations, despite the absence of a constitutional requirement for co-decision.

The devolved governments also sought to exploit soft power tools to augment their influence. They each reached out across party lines and within the wider policy community to help them develop cogent arguments when stating their case (Thorhallsson, 2017). The Scottish government sought cross-party support in the Scottish parliament and set up a prestigious Standing Council on Europe, whose members lent expert authority and policy advice during Brexit negotiations. Along with the large Remain vote in Scotland, and the renewed threat of Scottish independence, these activities reinforced the Scottish government's political leverage in its formal interactions with the UK government. The 35 strong bloc of SNP MPs in the House of Commons also provided a voice for the Scottish government in the House of Commons. For example, SNP MPs frequently advanced the case set out in *Scotland's*

*Place in Europe* and tabled amendments to UK legislation to align with the Scottish government's policy (see, for example, Hansard, 17 January 2017; 8 February 2017; 15 March 2017). The Welsh government's 'soft power' was hampered by the divergence between its pro-Remain position and the majority vote for Leave in Wales, though a strategic alliance with Plaid Cymru brought a degree of cross-party consensus to its proposals. Cross-party committees in the national assembly for Wales also lent political weight to the Welsh government in its engagement with the UK government. As the Brexit process unfolded, the Scottish and Welsh governments shared a strategic alliance aimed at enhancing their influence, including writing joint letters calling for the devolved administrations to be engaged more in Brexit policy development, and to urge the Prime Minister to reconsider her negotiating red lines (see, for example Masters, 2018; Drakeford/Russell, 2017).

In the event, however, the mobilization of bias resulting from the UK government's power over external relations meant that the Scottish and Welsh governments had little influence over the content and outcome of UK Brexit negotiations. This is evident in the divergence between their 'soft Brexit' preferences and the decisions taken by the UK government that set the UK on a path towards leaving the single market and the customs union. Moreover, a closer examination of the procedural routes exposes the precarious nature of a power that relies upon informal commitments and goodwill. Despite the commitment to reach consensus with the devolved governments on a UK approach to Brexit, the Prime Minister's Lancaster House speech setting out her Brexit 'red lines' was delivered without prior discussion or agreement with the devolved governments. Indeed, the speech was delivered two days prior to the meeting of the Joint Ministerial Committee to which the Scottish and Welsh governments had formally

tabled their Brexit proposals (Scottish Parliament, 2017). The Prime Minister's letter to President Donald Tusk initiating the Article 50 exit process was also not shared or agreed with ministers from the devolved governments prior to its release. Carwyn Jones told the Senedd on 29 March, the day the letter was sent to the President of the European Council, that he:

'didn't see the letter before today and we were not invited to contribute to its drafting. This is unacceptable and is the culmination of a deeply frustrating process in which the devolved administrations have persistently been treated with a lack of respect' (National Assembly for Wales, 2017).

Likewise, Michael Russell, then Minister for UK Negotiations on Scotland's Place in Europe, told a parliamentary committee: 'I saw the article 50 letter about half an hour after the Prime Minister stood up to speak about it in the House of Commons. I did not see a draft or any other text before then' (SP CTE&ER committee, 2017a).

This pattern continued during the withdrawal negotiations. From March to October 2017, there were no meetings of the JMC EN, despite repeated public calls from the devolved governments to reconvene. As a result, the procedural avenues that in principle could provide the devolved governments with an opportunity to raise their concerns were blocked during a period when a series of Brexit position papers were published by the UK government. Although devolved governments were given sight of sections of the 2018 white paper on *The Future Relationship between the United Kingdom and the European Union*, according to Russell, 'there was the possibility of saying, "That, factually, does not work."' However, with regard to engagement in the

process and any influence on the matter, the opportunities were virtually non-existent' (SP CTE&ER committee, 2017b: 3).

Consultation on and influence over the Withdrawal Agreement and Political Declaration appears to have been even more limited, despite it including commitments that impinged directly upon devolved competence. In evidence to the Exiting the EU committee, the then Welsh Cabinet Secretary with responsibility for Brexit negotiations (and later First Minister), Mark Drakeford, characterised the JMC EN as 'a forum where devolved Administrations are able to be there and to put our point of view (but) to date, it has failed to give confidence... that those views are making a genuine impact on the thinking of the UK government' (HC Exiting the EU Committee, 2017; see also officials' perspectives in Hunt and Minto, 2017).

With respect to the external dimension of Brexit, then, although new procedural opportunities were opened by the creation of the JMC EN and the offer of co-determination its terms of reference suggested, the absence of constitutional authority meant there were no means to ensure adherence to these terms, or to ensure devolved government preferences found their way into the UK's negotiating position. Given the high salience of the issues, there were few opportunities for soft power strategies to counterbalance the limitations of constitutional and procedural power and entice the UK government to align with devolved interests (Nye, 2004; Panke, 2010). Moreover, the Scottish government's political leverage in the early phase of Brexit negotiations - which may have encouraged the Prime Minister to reach out to the devolved governments - was diminished after the 2017 General Election. The SNP won the vote comfortably in Scotland but lost 21 seats. By contrast, the Scottish

Conservatives, having campaigned exclusively on an anti-independence referendum platform, secured their best electoral performance since 1983. Consequently, the 2017 election outcome in Scotland made the threat of Scottish independence appear less imminent. At the same time, the loss of her parliamentary majority weakened the Prime Minister's authority within her party and in parliament and gave the Democratic Unionist Party the balance of power. Indeed, the relative weakness of the Scottish and Welsh governments contrasts sharply with the influence that the Democratic Unionist Party was able to exert between 2017 and 2019, revealing the power potential of small parties in the House of Commons during periods of minority government. The result was to make it considerably more difficult to reconcile the competing factions within her own parliamentary party, let alone accommodate the preferences of the devolved governments.

### **Devolved Government Influence and the Internal Dimension of Brexit**

Whereas the UK government's negotiating objectives remained broadly similar with respect to the external dimension of Brexit during Mrs May's premiership, more changes were evident in internal Brexit policy, especially in the process of legislating for EU withdrawal. Though the regulations permitted in section 12 of the European Union (Withdrawal) Act 2018 retained the potential to constrain devolved competence, they represented a much looser constraint than was originally envisaged. There is sufficient evidence to suggest that the power exerted by the devolved governments during the bill's passage was a significant factor in forcing change.

The devolved governments made clear their opposition to the bill from the outset. They considered the original proposals to be a raid on devolved competence, as well as a threat to the reserved powers model of devolution. In a joint statement issued in response to the bill's publication, the Scottish and Welsh First Ministers described it as 'a naked power-grab' and 'an attack on the founding principles of devolution' (Sturgeon/Jones, 2017a). Yet, their constitutional authority to effect change was modest at best.

The devolution statutes preserved the authority of the UK parliament to make laws for Scotland, Wales and Northern Ireland, including in areas of devolved competence. However, Westminster parliamentary sovereignty is offset by the constitutional convention that it will not normally legislate in areas of devolved competence, or alter the competences of the devolved institutions, without their consent. The symbolic significance of that convention, commonly known as the Sewel convention, was underlined by its inclusion in the Scotland Act 2016 and the Wales Act 2017. Nonetheless it remains a convention and, as the Supreme Court confirmed in the first Miller case, its inclusion in the devolution statutes did not alter the fact that it has no legal effect, nor is its use or non-use subject to judicial review (Supreme Court, 2017: pp151; McHarg, 2018). It should thus be regarded as a soft constraint on the constitutional authority of the UK parliament to legislate on devolved matters. The UK government had conceded that key elements of its EU Withdrawal legislation should be subject to the convention and it thus sought due consent from the devolved legislatures. Its enactment, despite the withholding of consent by the Scottish parliament, marked the first time the convention had not been honoured.

EU relations are a reserved matter and thus the devolved institutions had no constitutional authority to veto or modify the UK withdrawal legislation. However, their competence to legislate in devolved matters faces few legal constraints. Unless they are given protected status within the devolution statutes, UK Acts of Parliament do not have legal supremacy over devolved Acts.<sup>4</sup> Thus, the Scottish and Welsh legislatures introduced emergency legislation to pass their own 'continuity' bills before the UK bill completed its passage. These bills were designed to provide legal continuity after 'exit day' within areas of devolved competence and make redundant the offending devolution clauses of the UK bill. They were a coordinated attempt to secure changes to the UK legislation, and to preserve the devolved institutions' constitutional capacity to 'protect the continuity of EU law in devolved areas in the manner of their choosing' (Cowie, 2018: 26). On introducing the Scottish continuity bill, the Cabinet Secretary, Michael Russell, described it as 'contingency planning', noting: 'If a deal can be reached with the UK government, we would be able to come to Parliament with a proposal to give consent to the European Union (Withdrawal) bill, and to repeal this one' (Scottish Parliament, 2018, c60). However, the UK Attorney General referred both bills to the UK Supreme Court to test whether or not they fell within devolved competence before they could secure Royal Assent (the referral of the Welsh bill was later withdrawn following the Welsh Assembly's consent for the UK bill).<sup>5</sup> In the meantime, the UK Act became one of the enactments protected from modification within the Schedule 4 of the Scotland Act 1998 and Schedule 7b of the Government of Wales Act 2006. The Court's judgement on the Scottish continuity bill exposed the asymmetry in the constitutional power bases of the UK and devolved governments. The Court determined that the Scottish legislation had been largely within competence

at the time of its passing, but most of it was rendered beyond competence as a result of the protected status afforded to the UK Act (Supreme Court, 2018).

The devolved governments exploited procedural bases of power to advance their interests. As discussed above, the JMC EN provided no opportunity for the devolved governments to co-determine the UK's Brexit negotiations, despite the apparent intention of its terms of reference. However, it became a key forum within which the devolved governments could push for changes to domestic Brexit legislation. According to the Chancellor of the Duchy of Lancaster, David Lidington, then lead UK minister for intergovernmental relations, the 'priority' was 'to reach agreement with the Scottish and Welsh governments on the EU (Withdrawal) bill... to find a mutually acceptable way forward' (Lidington, 2018; see also National Assembly for Wales, 2018; JMC Joint Secretariat, 2018). The JMC EN also agreed principles to underpin joint working on UK common frameworks (JMC EN, 2017). The devolved governments accepted that some common frameworks may be required to replace EU regulations but insisted 'the way to achieve these aims is through negotiation and agreement, not imposition' (Sturgeon/Jones, 2017a).

These negotiations ultimately led to amendments to the European Union (Withdrawal) Act 2018 that changed the nature of the legal constraint that had been the subject of Clause 11. The general constraint was removed, thus preserving the reserved powers model of devolution. Devolved legislatures can now modify retained EU law *except* where these laws are the subject of a regulation, following the process set out in section 12 of the Act. That process requires the UK government to secure a 'consent decision' from the devolved institutions before introducing such regulations in the UK



parliament. In this context, the meaning of 'consent' is a marked departure from the legislative consent requirement of the Sewel convention. In the European Union (Withdrawal) Act 2018, a 'consent decision' includes a devolved legislature agreeing to a motion on the regulation, deciding not to agree such a motion, or agreeing to a motion that refuses to consent to the regulations. In an accompanying intergovernmental agreement, the UK government gave a non-binding commitment to 'freeze' EU law in these areas and refrain from bringing forward new legislation to allow the administrations to work collaboratively toward common legislative and non-legislative frameworks (UK government, 2017b). For the Welsh government, the amendments and intergovernmental agreement represented 'a major advance over the original proposals' and were deemed sufficient for it to recommend legislative consent for the UK bill (National Assembly for Wales, 2018). The Scottish government maintained its opposition. This divergence reflected a willingness on the part of the Labour-led Welsh government to find compromises that protect devolution without destabilizing the Union. For the pro-independence SNP government, the defence of Scottish self-government, including the right of the Scottish parliament to grant or withhold explicit consent to changes in devolved areas, is absolute. This left little room for compromise.

The constitutional and procedural routes to influence were supplemented by soft power diplomacy, and the devolved governments used some of the 'counter-balancing strategies' identified by Panke (2010) to overcome their relative constitutional and procedural weakness. In particular, and to an unprecedented degree, the Scottish and Welsh governments developed a strategic alliance, setting aside their party-political differences and divergent constitutional preferences. This included bilateral inter-

ministerial meetings to coordinate responses to the UK bill (Scottish government, 2017a) and a stepping up of collaborative working between their respective officials. The Scottish and Welsh First Ministers sent joint letters to the Prime Minister. In one, they explained their objections to the devolution clauses of the bill and offered to work cooperatively on the basis of consensus, complaining that ‘the approach of the UK government to devolution in the EU (Withdrawal) bill is preventing this essential co-operation and co-ordination’ (Sturgeon/Jones, 2017b; see also Sturgeon/Jones, 2017a; 2018). The two governments agreed to coordinate advice to legislative committees ‘to ensure they fully understand our concerns and our alternative proposals’ (Scottish and Welsh governments, 2017a). They simultaneously published Legislative Consent Memoranda in their respective legislatures, to make clear why they could not present Legislative Consent Motions (LCMs) under the Sewel convention process (Scottish government, 2017b; Welsh government, 2017). Together, they prepared an extensive set of joint proposed amendments to the Withdrawal bill, which they argued would provide for continuity without compromising devolution (Scottish and Welsh governments, 2017b). They also cooperated with each other when preparing their respective continuity legislation.

All of this activity helped to ensure that the devolution aspects of the legislation were on the agenda not just of the devolved institutions but of the UK government and parliamentary committees in Westminster (HC PACAC, 2017; HC SAC, 2017; HL EU Comm., 2017). Although the Scottish government is more resource-rich than its Welsh counterpart, with heightened constitutional politics that usually lend it more political weight, the Welsh government was arguably in a stronger position to gain political leverage by cultivating ‘network capital’ (Golub, 2012), especially in the House of

Lords, where the devolution clauses and the government's amendments to them were subject to particular scrutiny. The SNP maintains a principled opposition to the House of Lords and, consequently, the SNP government, in contrast to the Labour government in Wales, had no party allies in the Upper House. Moreover, the Welsh government had already nurtured relations with the Lords in its attempts to improve recent Welsh devolution legislation. The internal dimension of Brexit has also revealed how the Welsh government has carved out a niche for itself as a 'unionist nationalist' government. It has fiercely defended the autonomy of the devolved institutions alongside its Scottish counterpart while still remaining, in Hunt and Minto's (2017) term, a 'good unionist', supporting the UK government in preserving the Union against the threat of Scottish independence. As such, it has arguably used its status as the smaller, less politically threatening, partner to its strategic advantage, helping it to secure some concessions from the UK government that are at least partially more aligned with devolved interests.

With respect to the internal dimension of Brexit, then, the devolved governments were in a position to marshal some of their power bases to secure concessions from the UK government, especially when they worked together. They used limited constitutional power by passing their own legislation in a bid to persuade the UK government and parliament to amend the Westminster bill. They accessed formal and informal intergovernmental processes, bolstered by soft power, to generate cross-party and cross-parliamentary consensus concerning the inadequacies of the provisions in the bill as introduced, thus supporting the push for change with UK ministers. The resultant effect is that the changes made by the UK government concerning the devolution clauses of the Withdrawal legislation, and its collaborative approach in developing

common frameworks, went at least some way towards reflecting the preferences of the devolved governments.

## **Conclusion**

This article set out to explore the power and influence of the devolved institutions in shaping the UK's approach to Brexit. We hypothesized that the relative weakness of their constitutional authority, coupled with the lack of institutionalised, formal intergovernmental relations, would limit the devolved governments' scope for influence, leaving them to seek 'soft power' routes to influence. The empirical analysis suggests a more nuanced dynamic, especially when we distinguish between the external and internal Brexit process.

First, there is no doubt that the devolved governments were in a constitutionally inferior position in the Brexit process. International relations lie within the constitutional jurisdiction of the UK parliament and government, and it is the latter that retains the legal authority to speak and act for the UK. However, in the domestic Brexit process, the devolved governments made use of their authority to introduce laws in areas of devolved competence by introducing their own domestic Brexit legislation. The Supreme Court challenges and the protection from modification the UK parliament gave to the European Union (Withdrawal) Act exposed the constitutional power imbalance. Nonetheless, the primary purpose of these continuity bills was to put pressure on the UK government to amend its own legislation to reflect the concerns about its impact on devolution. As such, it illustrates how one power base can be used to augment another; in this case, limited constitutional authority enhanced the

devolved governments' capacity to effect change via procedural, intergovernmental channels.

Second, the ad hoc nature of UK intergovernmental relations limits the devolved governments' procedural power base. There is no requirement to meet, to co-decide or to share policies or draft legislation at an early stage of development. There are no rules governing conduct, and no recourse to an impartial umpire when disputes arise. Yet, there is no doubt that Brexit spawned a considerable increase in the procedural opportunities available to the devolved governments to voice their concerns. At the very least, this brought issues to the attention of UK government ministers. Once again, we see a difference in the internal and external dimensions of Brexit. By committing to 'seek to agree' a common UK approach to Brexit, the terms of reference of the JMC (EU Negotiations) raised expectations among the devolved governments of more influence than had hitherto been permitted within the JMC structure. But *seeking* agreement is not the same as *requiring* agreement, and there was no procedural remedy to the failure to reach intergovernmental agreement on a common Brexit policy. The recorded frustrations of key ministers in the devolved governments, and the divergence between their stated preferences and the outcomes of Brexit negotiations, confirms that the UK's external Brexit policy rarely or never reflected devolved government preferences. Yet, the JMC EN, alongside less formal meetings, did become a place for intense negotiations on amendments to the domestic legislation on EU withdrawal and for nurturing a cooperative approach towards the development and governance of new UK common frameworks.

These procedural opportunities were augmented by soft power. This was most notable in the extent to which the devolved governments drew upon cross-party consensus from their respective legislatures, the unprecedented collaboration between the two administrations who, for the most part, presented a united front in their demands to the UK government, and in their networking and collaboration with parliamentarians in the House of Commons and House of Lords. This was most evident, and most effective, in the domestic Brexit process, where the devolved governments clearly achieved change in the UK legislation, at least with respect to its impact on devolved competence. They were largely ignored over concerns they raised about the fate of the Charter of Fundamental Rights and the general principles of EU law. Moreover, they did not secure all changes they had demanded to the devolution clauses; indeed, the changes were insufficient for the Scottish government or parliament to consent to the legislation. Nonetheless, despite the constitutional right of the UK parliament to legislate as it sees fit, the law was changed to be more sympathetic to devolution and was a marked departure from the UK government's original proposals.

The devolved governments thus had some power to shape UK policies in the domestic sphere when matters directly affected devolution. This is recognition of their political authority over, and co-ownership of, the devolved institutions. The Sewel convention has been a further manifestation of that co-ownership; the convention that the UK parliament will not normally legislate in matters that fall within the competence of the devolved legislatures without their explicit consent has been a cornerstone of devolution since its introduction in 1999. But the passing the European Union (Withdrawal) Act in 2018 without the consent of the Scottish parliament may have set

a new precedent, at least for Brexit-related legislation. Indeed, when in January 2020, the UK parliament passed the EU (Withdrawal Agreement) Act to give effect to the UK-EU exit deal negotiated between the EU and Boris Johnson's government, it did so despite all three devolved legislatures having withheld their consent. This included the unanimous opposition of the newly restored Northern Ireland Assembly. These developments have left the standing of the Sewel convention in some doubt.

Thus, Phase 1 of the Brexit process generated new procedural opportunities for the devolved governments, but these were heavily constrained by their constitutional weakness vis-à-vis the UK government. The marginalization of the devolved governments in Brexit negotiations, and the enactment of the EU (Withdrawal) Act without the consent of the Scottish parliament, contributed to a deterioration of intergovernmental trust. In addition, even though no regulations had been introduced during phase 1, the regulatory authority granted by the section 12 regulations of the 2018 Act ensured a shadow of hierarchy remained.

There are many difficult issues bound up in phase 2 of the Brexit process, including negotiating the future UK-EU relationship, negotiating trade deals and developing legislative or non-legislative frameworks to maintain the UK 'internal market'. Each of these will have direct or indirect effects on devolved competence and can be expected to generate new challenges in intergovernmental relations. It is not yet clear whether Boris Johnson's government, emboldened by its parliamentary majority, will approach these issues with a will to compromise, or whether it will adopt a more adversarial approach, exercising its constitutional authority and mobilization of bias to crowd out devolution issues and the interests of the devolved governments. The resurgence of

the politics of independence, as a result of the SNP's electoral success north of the border in the 2019 general election, may likewise embolden the SNP government in intergovernmental relations, potentially heightening its political leverage vis-à-vis the UK government. This, in turn, has the potential to crowd out the more pragmatic unionist nationalism of the Welsh government, diminishing its brokerage potential. Given the political salience of both Brexit and independence, the room for intergovernmental compromise may be very small indeed.

**Acknowledgements:** The research in this paper was supported by two ESRC research grants: ES/P009441/1 and ES/R001308/1. I am grateful to the Scottish government constitution and UK relations team for welcoming me during a short secondment and considerably enhancing my understanding of that government's approach to intergovernmental relations. I am also indebted to the three anonymous referees and the special issue editor, Prof Dan Wincott, for very insightful and constructive comments on an earlier draft.

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<sup>1</sup> The Northern Ireland Executive collapsed on 16<sup>th</sup> January 2017 when the then Deputy First Minister Martin McGuinness resigned, and successive attempts at cross-party talks failed to restore power-sharing government throughout the period under study. The Executive was eventually re-formed in January 2020.

<sup>2</sup> The author benefited from a part-time secondment in the Scottish government's UK Relations team from January – August 2019. This aided her understanding of the Scottish government's approach to and experience of intergovernmental relations. All documentary evidence used in this article is already in the public domain.

<sup>3</sup> No ministerial forums took place in the final five months of Mrs May's premiership, reportedly in a dispute about the forum's purpose in Brexit negotiations.

<sup>4</sup> Under the reserved powers model, the devolved legislatures are free to legislate in any areas not identified in the devolution statutes as reserved matters, except those specific Acts of Parliament that are given protected status and so protected from modification (in schedule 4 of the Scotland Act (1998) and Schedule 7B of the Government of Wales Act).

<sup>5</sup> The *Law Derived from the European Union (Wales) bill* (Welsh Continuity bill) was introduced on 27 February 2018, completed its parliamentary stages within three weeks, was enacted in June 2018 and repealed in November 2018, six months after its referral to the Supreme Court was withdrawn. The *UK Withdrawal from the European Union (Legal Continuity) (Scotland) bill* was tabled on 28 February 2018, and passed its parliamentary stages within three weeks, but could not be enacted while the case was being considered by the Supreme Court.